In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1352

NORTHERN STATES POWER COMPANY, ET AL.,
PETITIONERS

v.

RURAL ELECTRIFICATION ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, 1–28) is reported at 373 F. 2d 686. The opinion of the district court is reported at 248 F. Supp. 616.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1967. The petition for a writ of certiorari was filed on May 4, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners, electric power companies, have standing to attack a proposed loan by the Rural Elec-

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trification Administration which will finance the construction of transmission facilities by a rural electric cooperative, thereby freeing the cooperative from the necessity of leasing petitioners' transmission facilities.

STATUTES INVOLVED

The relevant provisions of the Rural Electrification Act and the Administrative Procedure Act are printed in Pet. App. D.

STATEMENT

REA is an agency within the Department of Agriculture. The Rural Electrification Act of 1936, 49 Stat. 1363, 7 U.S.C. 901 *et seq.*, makes REA responsible for making loans to finance the construction and operation of generating plants and electric transmission and distribution systems which will furnish electric energy to rural areas not receiving central station power. The procedures applicable to such loans are prescribed in an REA policy statement (REA Bulletin 111–3, 29 Fed. Reg. 2765–2766; Pet. App. 64–68) which requires the Administrator of REA to (1) make a survey and determine wherein existing or proposed power supply or transmission contracts are unreasonable, (2) advise present suppliers or transmitters why their contracts are unreasonable, and (3) attempt to have the contracts modified to make them reasonable.

On May 26, 1965, following extensive but unsuccessful negotiations between REA, East River Electric Power Cooperative, Inc., and petitioners (electric power companies) concerning the making of reasonable transmission contracts, REA approved a loan to East River in the amount of $5,919,000 for the construction by East River of its own transmission facili-

ties in Minnesota and South Dakota (R. 26, 27–29).[1] Before approving the loan REA had conducted the required power survey (R. 27) and had informed petitioners wherein their final proposals were, in the agency's view, unreasonable (R. 29; S.R. 113–115).

On August 12, 1965, petitioners filed this action to enjoin REA from making the loan funds available to East River. Petitioners alleged, *inter alia,* that REA had failed to comply with its own policy bulletin in that it had failed to advise petitioners wherein their October 2, 1964, proposal was unreasonable and to endeavor to have the proposal made reasonable (R. 20); and that if East River obtained the loan funds and constructed the contemplated facilities, petitioners would suffer pecuniary damage in excess of one million dollars by the displacement of their present transmission service to East River (R. 22). REA Bulletin 111–3 was invoked, in conjunction with Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009, as conferring standing to sue (R. 10, 14–15).

REA moved to dismiss the complaint, one ground being that petitioners lacked standing to maintain the action (R. 25). The district court denied the motion (R. 43) and entered a preliminary injunction restraining REA from disbursing the loan funds to East River (R. 100). The court of appeals reversed, and ordered the complaint dismissed, on the ground that the REA Bulletin did not confer any legally enforceable rights upon the petitioners to challenge the making of the loan (Pet. App. 27–28).

[1] "R." refers to the record appendix filed by respondents in the court of appeals, "S.R." to petitioners' supplemental record appendix in that court.

ARGUMENT

The single question presented by the petition is whether an electric power company has standing to challenge a REA loan to a competing electric cooperative on the ground that the loan was approved without compliance with procedures prescribed in a policy bulletin issued by the REA Administrator. As the court below observed (Pet. App. 14, n. 12), the precise issue was resolved adversely to the power companies by the Fifth Circuit in *Rural Electrification Administration* v. *Central Louisiana Electric Co.* (*"CLECO"*), 354 F. 2d 854. Certiorari in that case was denied by this Court earlier this Term. 385 U.S. 815. The decisions of the Fifth and Eighth Circuits are clearly correct, and nothing has happened since the denial of certiorari in *CLECO* to warrant review of the question by this Court.

1. This Court has repeatedly held that damage flowing from lawful competition, though assisted by assertedly unlawful federal action, is without more *damnum absque injuria*. See *e.g., Alabama Power Co.* v. *Ickes*, 302 U.S. 464; *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118.[2] And even

[2] See, also, *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924 (C.A. D.C.), certiorari denied, 350 U.S. 884; *Rural Electrification Administration* v. *Central Louisiana Electric Co.*, 354 F. 2d 859 (C.A. 5), certiorari denied, 385 U.S. 815; cf. *Pennsylvania R. Co.* v. *Dillon*, 335 F. 2d 292 (C.A. D.C.), certiorari denied *sub nom. American Hawaiian S.S. Co.* v. *Dillon*, 379 U.S. 945; *Pittsburgh Hotels Assoc.* v. *Urban Redevelopment Authority*, 309 F. 2d 186 (C.A. 3), certiorari denied *sub nom. Hilton Hotels Corp.* v. *Urban Redevelopment Authority*, 372 U.S. 916; *Berry* v. *Housing and Home Finance Agency*, 340 F. 2d 939 (C.A. 2); *Taft Hotel Corp.* v. *Housing and Home*

petitioners appear to recognize (at least implicitly) that nothing in the terms of the Rural Electrification Act evinces a congressional design to accord any power company the right to prevent loans under the Act. And the legislative history shows that Congress' principal objective was to provide electric power to those in rural areas who were without it and that there was no purpose to protect private power companies from competition by the cooperatives. See, *e.g.*, 80 Cong. Rec. 2752; Hearings before House Committee on Interstate and Foreign Commerce on S. 3483, 74th Cong., 2d Sess., p. 56–57. The Act neither provides for notice or hearing with respect to proposed loans nor contains any reference to "person aggrieved,"[3] "any person who will be adversely affected",[4] "any party in interest",[5] or any of the other phrases found in statutes which have been construed to confer a right to sue. Compare *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 476–477. For these reasons, the Courts of Appeals for the District of Columbia Circuit and the Fifth (as

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Finance Agency, 262 F. 2d 307 (C.A. 2), affirming 162 F. Supp. 538 (D. Conn.), certiorari denied, 359 U.S. 967.

[3] *E.g.*, Section 9(a) of the Securities Act of 1933, 15 U.S.C. 77i(a); Section 24(a) of the Utility Holding Company Act, 15 U.S.C. 79x(a); Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b); *Section* 402(b)(6) of the Federal Communications Act of 1934, 47 U.S.C. 402(b)(6).

[4] *E.g.*, Section 701(f)(1) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 371(f)(1); Section 402(b)(6) of the Federal Communications Act of 1934, 47 U.S.C. 402(b)(6).

[5] Section 1(20) of the Interstate Commerce Act, 49 U.S.C. 1(20); cf. Section 1006(a) of the Federal Aviation Act of 1958, 49 U.S.C. 1486(a) ("any person disclosing a substantial interest").

well as Eighth) Circuit have held that the Rural Electrification Act does not confer standing upon power companies to challenge loans approved by the REA administrator. *Kansas City Power & Light Co.* v. *McKay,* 225 F. 2d 924, certiorari denied, 350 U.S. 884; *Rural Electrification Administration* v. *Central Louisiana Elec. Co.,* 354 F. 2d 859 (C.A. 5), certiorari denied, 385 U.S. 815. The *Kansas City Power & Light* case was decided more than a decade ago, but Congress has not, since that decision, seen fit to amend the Act to provide for judicial review of the approval of loan applications by potential competitors.[6]

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[6] In 1962 Mr. Walter Bouldin of Alabama Power Company proposed to the House Committee on Agriculture that the Rural Electrification Act be amended to read:

> *Provided*, That loans for generating capacity shall not be made by the Administrator where there is an adequate supply of electric energy available from investor-owned, taxpaying sources at publicly regulated rates and conditions of service, nor shall such loans be made until after due public notice has been given by the Administrator and provision made for interested parties to be heard in connection therewith.

Hearings on Food and Agriculture Act of 1962 before House Committee on Agriculture, 87th Cong., 2d Sess., pp. 680–681. The House Committee declined to take favorable action on this proposed amendment. In 1963, Mr. Bouldin's proposal was incorporated in two House bills, H.R. 6852 and H.R. 7213, 88th Cong., 1st Sess. These bills in express terms provided for judicial review:

> Provided further that any determination by the Secretary of Agriculture under the Act with respect to generation and transmission loans shall be subject to review in the same manner as orders of the Secretary subject to the act of December 29, 1950, as amended * * * [the Administrative Orders Review Act, 5 U.S.C. 1031 *et seq.*]

The House declined to take favorable action on these bills also.

There is accordingly no merit to petitioners' contention that they have standing to complain of alleged violations of REA Bulletin 111–3. The bulletin simply sets forth the procedures that the Administrator follows in administering the lending program authorized by the Act. Whether or not the bulletin has the status of a regulation, it obviously confers no greater rights upon competing power companies than does the Act itself.[7] Thus, since the power companies have no standing to enforce the terms of the Act, perforce they cannot attack the proposed REA loan on the assertion that the provisions of the bulletin have been violated.

2. Nor is the decision below in conflict with the decision of the Sixth Circuit in *Kentucky Utilities Co.* v. *Tennessee Valley Authority* (No. 16,491, decided November 15, 1966), certiorari granted on March 28, 1967, No. 1063, O.T. 1966, *Kentucky Utilities*. involved a 1959 amendment to the Tennessee Valley Authority Act (Public Law 86–137, 73 Stat. 280) prohibiting TVA from becoming a supplier of power outside of its primary service area as of July 1, 1957. Regardless of whether the Sixth Circuit's determination that the amendment conferred standing upon existing power suppliers to challenge new TVA power supply contracts is sound, it is of no assistance to petitioners here. In the absence of a traditional basis of standing, the right to maintain an

[7] While petitioners suggest (Pet. p. 12) a disagreement between the Fifth Circuit in *Central Louisiana* and the court below as to whether the bulletin is a regulation, both courts—as mentioned earlier—concluded that, however regarded, the bulletin does not provide a basis for standing to sue REA.

action obviously depends on the intent of the framers of the particular statute sought to be sued under. The Sixth Circuit's determination was based upon an interpretation of the legislative history of the TVA Act amendment as disclosing a purpose to protect private power companies from encroachments by TVA. At a minimum, we submit, such a purpose must appear before standing predicated solely on competitive injury may be asserted. And as previously noted, *supra,* p. 5, it is clear that neither the legislative history nor the express provisions of the Rural Electrification Act support a claim that Congress intended any protection of existing power suppliers or transmitters against competition by REA loan recipients.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.[8]

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[8] Petitioners' discussion of the import of 28 U.S.C. 1361 (Pet. 19–21) is irrelevant. The availability of the mandamus remedy provided in Section 1361 depends upon the plaintiff's standing to maintain the action.

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